No. 77-453

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a-42a) is reported at 550 F. 2d 198; the decision of the court of appeals denying petitioner's motion for rehearing and motion for rehearing *en banc* (Pet. App. 44a-47a) is reported at 556 F. 2d 1280. The decision and order of the National Labor Relations Board (Pet. App. 4a-25a) are reported at 215 NLRB 271.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on April 29, 1977. A timely petition for rehearing was denied on August 5, 1977 (Pet. App. 47a). The petition for a writ of certiorari was filed on September 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that employee distribution of a union news bulletin which concerned, *inter alia*, a state right-to-work law and a federal minimum wage law, was concerted activity protected by Section 7 of the National Labor Relations Act, and that in the circumstances of this case the Company violated Section 8(a)(1) of the Act by prohibiting such distribution on non-working time in non-working areas.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. 3.

STATEMENT

1. In March and April of 1974, the Union[1] asked the Company for permission for employees to distribute a news bulletin from the local union president on non-working time in a non-working area (Pet. App. 13a). The news bulletin (Pet. App. 1a-3a) contained four sections:(1) an encouragement to members to take an active part in the union; (2) a discussion of a proposal to place a "right to work" provision in the proposed new state constitution and a suggestion that members write to their state representatives and senators opposing such a provision; (3) a criticism of President Nixon's veto of a minimum wage bill and a request that members not registered to vote do so because "[a]s working men and women we must defeat our enemies and elect our friends"; and (4) a statement further encouraging participation in the Union.

The Company denied permission to the Union to distribute its news bulletin, stating that the Union had "other ways to communicate with [its] membership" (Pet.

[1]United Paperworkers International Union, Local 801.

App. 14a). The Company gave no further explanation for its refusal to the employees, but explained at the hearing before the Board that it would not have objected to distribution of the first and fourth sections of the Union's bulletin, but that it denied permission to distribute the bulletin because the rest of the document, dealing with the state right-to-work law and the federal minimum wage, did not relate to the Company's "association with the Union" (Pet. App. 16a).

2. The Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by prohibiting distribution of the news bulletin on its premises (Pet. App. 20a). The Administrative Law Judge (ALJ), whose decision was adopted by the Board, rejected the Company's contention that its prohibition was lawful because the minimum wage and right-to-work portions of the circular had no relation to the Company's association with the Union (Pet. App. 16a). The ALJ, pointing out that Section 7 of the Act, 29 U.S.C. 157, protects the rights of employees to engage in concerted activities not just for the purpose of collective bargaining but for "other mutual aid or protection" as well, concluded that the disputed portions of the circular fell well within those categories. Thus, regarding the second section of the bulletin, the ALJ explained that, "[u]nion security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that [the Union's 'commentary' on the proposed right-to-work provision for the state constitution] is 'pertinent to a matter which is encompassed by Section 7 of the Act' " (Pet. App. 17a). He further noted, regarding the third section, that the Union's statement on minimum wage proposals and "urging the election of legislators favorable to a higher minimum wage, also is pertinent in terms of Section 7, even though [the Company's] employees receive well over the sought-after minimum wage. The minimum

wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum." (Pet. App. 18a.)

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 27a).[2] The court stated (Pet. App. 33a):

> Eastex prohibited distribution of the bulletin because parts [2] and [3] were purely political and did not pertain to anything over which "Eastex had the authority or power to change or control." We do not accept Eastex's position. Both parts are sufficiently related to employment situations to merit §7 protection. * * *

In the court's view (Pet. App. 36a), "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here * * *."

Applying this test to the material in issue, the court concluded (Pet. App. 39a-41a):

> One can hardly imagine a matter on which organized labor * * * has a more direct interest than right-to-work laws.* * *
>
> * * * * *
>
> Part [2] [of the bulletin] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The

[2]The court of appeals rejected the Board's alternative argument that even if the disputed portions of the bulletin had been unprotected, the existence of protected material would have made the Company's prohibition unlawful (Pet. App. 18a, 41a-42a).

The Company did not challenge the finding by the Administrative Law Judge that it had maintained an unlawfully broad no-solicitation rule (Pet. App. 6a-9a).

> workers have a real interest in bringing to bear whatever political pressure they might have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within §7 protection.
>
> Although a bit more tenuous, we think part [3] "Politics and Inflation," is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86 has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. [Footnote omitted.]

The court denied the Company's petition for rehearing (Pet. App. 47a), but amended its decision to delete references to the First Amendment contained in its opinion, in conformance with the admonition in *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, to determine the content of Section 7 rights under statutory rather than constitutional principles (Pet. App. 45a-47a).

ARGUMENT

1. The court of appeals correctly upheld the Board's determination that the distribution of the bulletin by respondent's employees in non-working areas on non-working time was a "concerted activit[y] for the purpose of * * * mutual aid or protection" within the meaning of Section 7 of the Act, and that petitioner's prohibition of that activity violated Section 8(a)(1) of the Act.

The determination whether activities by employees on the employer's property are protected under the Act from employer restraint requires two inquiries. The first inquiry is

whether the activities bear a reasonable relation to those rights secured by the broad terms of Section 7, which provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

If an activity is so related, the second inquiry is whether the employer's legitimate interests in production and work discipline justify a limitation on that activity in the circumstances. As this Court said in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797-798, the Act represents "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." See also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 522; *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 324.[4]

Applying these principles to circumstances similar to those here, the Court in *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* affirmed the well-settled rule that it is an unfair labor practice for an employer

[4]Petitioner errs in contending that the decision below is contrary to *Hudgens, supra; Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539; and *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Those cases merely recognize that the exercise of Section 7 rights must be accommodated to the business interests and property rights of employers "with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock & Wilcox Co., supra*, 351 U.S. at 112. They did not define the scope of Section 7 rights.

to prohibit the distribution of union literature by employees on non-working time in non-working areas in the absence of special circumstances that justify a curtailment in the interests of production or discipline. Here, the petitioner did not assert any business related interest warranting its refusal to allow distribution of the bulletin by employees in non-working areas on non-working time, beyond its claim that two of the four paragraphs of the bulletin were not germane to its relationship to the Union or the employees. The court of appeals correctly held, however, that the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is not, as petitioner contends (Pet. 6), narrowly confined to "matters which are intimately connected to the employees' immediate employment or over which the employer has control."

Petitioner's narrow construction would effectively confine Section 7 activities largely to matters that would be the subject of bargaining between the employees and the employer, thereby ignoring the fact that Section 7 covers "activities for the purpose of collective bargaining [*i.e.*, with the employer] *or other mutual aid or protection*" (emphasis supplied). The broad purpose of the statute, as the court held, was to encompass "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant * * *" (Pet. App. 36a). As petitioner notes (Pet. 6), that interpretation has been upheld by all courts of appeals that have directly considered the issue.[5] See *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379, 1384-1385 (C.A. 9) (action of civil engineer

[5]Petitioner does not dispute the correctness of the court of appeals' conclusion that the two challenged paragraphs in the bulletin came within the terms of Section 7 as construed by the court. Petitioner disputes only the correctness of that construction.

in signing a letter to federal legislators opposing a competitor's application to immigration authorities for authorization to import foreign engineers was for "mutual aid or protection" within the meaning of Section 7; even though "the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship," it was concerted activity which affected the employees' job security);[6] *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. 2d 930, 937 (C.A. 1), certiorari denied, 312 U.S. 710 ("the right of employees * * * to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection', including appearance of employees representatives before legislative committees"); cf. *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 506 (C.A. 2) ("a union may subsidize propaganda, distribute broadsides, support political movements, and in any other [lawful] way further its cause or that of others whom it wishes to win to its side").

2. Petitioner errs in contending (Pet. 7-9) that the decision below is in conflict with decisions of three other circuits. While there are *dicta* in some of the cases cited by

[6]Contrary to petitioner's assertion (Pet. 6 n. 4), *Kaiser* did not create a division of authority within the Ninth Circuit on this issue. In *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200, 1203-1204 (C.A. 9), the issue was not whether the object of the employees' protest was protected, but rather whether the means employed (a 10-15 minute work stoppage) was proper. *National Labor Relations Board* v. *Tanner Motor Livery Ltd.*, 419 F. 2d 216, 218 (C.A. 9), likewise did not turn on whether the object of the protest was protected (the court conceded that it would be), but on whether the means used (picketing by individual employees without first securing union sanction) was protected.

petitioner that, taken out of context, would support petitioner's narrow construction of Section 7, they also contain language supporting a broader view, and the facts of each case are in any event quite different from those presented here. Thus, *National Labor Relations Board* v. *Bretz Fuel Co.*, 210 F. 2d 392, 398 (C.A. 4), involved a wildcat strike protesting a pending legislative proposal concerning coal mines, which was in breach of contract and was led by a person employed by the union to perform certain functions at the employer's mines. The court held that in the circumstances of an unauthorized strike, the employer's refusal to permit that non-employee to continue his functions at the mine did not violate Section 8(a)(1) and (3).

National Labor Relations Board v. *Leslie Metal Arts Co., Inc.*, 509 F. 2d 811 (C.A. 6), involved a work stoppage arising, in part, out of a purely personal quarrel between employees. Although the court said that a work stoppage "arising from purely personal quarrels unrelated to labor disputes with an employer" would not be protected by Section 7 and Section 8(a)(1), it nevertheless granted the Board's petition for enforcement on the ground that the walkout was in part in protest of the employer's failure to protect employees from physical violence from other employees. 509 F. 2d at 814.[7]

In *G & W Electric Specialty Co.* v. *National Labor Relations Board*, 360 F. 2d 873 (C.A. 7), the court held that the employer was entitled to discharge, after warning, an employee who circulated a petition relating to a dispute

[7]Moreover, the court's general statement that "[w]hen employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7" (509 F. 2d at 813) is not significantly different from the standard adopted by the court below.

among the officials of the employees' credit union. There was no union in the plant, and the credit union had been organized by the employees and was operated by them alone. Consistently with the rationale of the decision below, the court concluded that the discharged employee, in mobilizing support for his side of the dispute about the management of the credit union, was acting outside of any interest "*qua* employee," and apart from "the subject matter the Act is designed to embrace—labor-management relations." *Id.* at 876-877. Here, in contrast, the employee interests to which the challenged paragraphs of the bulletin pertain—their wages and right to union security—lie at the heart of the employment relation.

3. There is no basis for petitioner's claim (Pet. 12) that the test utilized here—*i.e.*, whether the activity is reasonably related to the employees' jobs or their employment conditions—is so broad as to be "almost meaningless." Both the Board and the court of appeals carefully explained why the disputed newsletter material bore on the employees' interest *qua* employees (*supra*, pp. 3-5). The Board's holding that the newsletter here was so related to legitimate employee interests does not mean that every political message which a union wishes to communicate to employees would be so related. The determination of the protected character of employee activity depends upon the "distinctive facts" of each case. *National Labor Relations Board* v. *Leece-Neville Co.*, 396 F. 2d 773, 774 (C.A. 5). The Board has simply held that, where, as here, the union addresses two employment-related subjects for employee political action, that communication is sufficiently germane to the employment relationship to be entitled to the Act's protection.[8]

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[8]Nor is there any basis for petitioner's claim (Pet. 12-16) that a remand is necessary because the Board failed to engage in a balancing of the employees' Section 7 rights against the employer's business or property interests in the first instance. As noted (p. 7, *supra*), petitioner has asserted no business or property interests that would have been affected by the distribution of the bulletin.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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